

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
)	
IN THE MATTER OF: PROTEST)	DECISION
CHARLES TOWNE LANDING)	
REDEVELOPMENT – ANIMAL)	
FOREST SEWER)	
STATE PROJECT P28-9632-MP-D)	POSTING DATE: November 2, 2000
EADIE’S CONSTRUCTION CO., INC.)	
vs.)	
SOUTH CAROLINA DEPARTMENT OF)	
PARKS, RECREATION AND)	
TOURISM)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Eadie’s Construction Company, Inc. (Eadie) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on Charles Towne Landing Redevelopment – Animal Forest Sewer Project (Project) for the South Carolina Department of Parks, Recreation and Tourism (PRT). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

PRT accepted bids on the Project. Eadie submitted a bid that was ruled non-responsive by PRT. The grounds for the ruling were that the value of the electrical portion of the work exceeded the license limitation on the value of the work which could be lawfully performed by the listed subcontractor. Eadie protests PRT’s ruling of non-responsiveness, contending that Eadie intended to provide the material for the electrical work, leaving the installation labor to the listed subcontractor, W. E. DeLonge Electrical, LLC (DeLonge).

FINDINGS OF FACT

1. On August 17, 2000 PRT received bids on the Project. Five bids were received, with two, including that of Eadie, ruled non-responsive.

2. Eadie possesses an Unlimited General Contractor's license for Public Utility-Water and Sewer Lines.
3. Eadie's Bid Form listed DeLonge as the Electrical Subcontractor. No other name was listed.
4. DeLonge has a Group 1 Electrical license, which limits the firm to the performance of electrical work valued at a maximum of \$17,500, including both materials and labor.
5. The Project's electrical work, including materials, is reasonably valued at approximately \$40,000, based on DeLonge's quotation to another bidder.

DISCUSSION

CLAIMANT'S POSITION

Eadie protests the finding of non-responsiveness for the following reasons:

1. On Page 2 of form A701, Instructions to bidders, Article 1 Definitions, paragraph 1.9 states: "A sub-bidder is a person or entity who submits a bid to a Bidder for materials, equipment OR labor for a portion of the work." By use of the word OR, Eadie contends that DeLonge provided a bid only for labor on the electrical portion of the work and DeLonge's bid was clearly within DeLonge's license limitations.
2. On the reverse side of SE-335 Bid Bond, paragraph 9.2.5 does not stipulate any special conditions for the listed electrical subcontractor.
3. Eadie contends that, in accordance with §40-11-300 of the S.C. Code of Laws (as amended), the total cost of construction must be used to determine the appropriate license group for a project. As Prime Contractor, Eadie contends that the total cost of construction for this project was well within Eadie's license limitations. Eadie argues that "...it should be permissible for it to purchase all materials for the project and utilize labor-only prices from my listed subcontractors. The subcontractor in question provided Eadie with such price, which was well within its license limitations."
4. Eadie argues that had the stipulation been made that the electrical subcontractor listed on the bid form must have license limitations that would exceed the total cost of construction for the electrical portion of the contract, then the listed subcontractor would have prepared a Joint

Venture bid for that portion, ensuring that the total cost of construction did not exceed their combined license limitations.

5. Eadie contends that under AIA Document A201, Article 3 General Provisions, sub-section 3.4 Labor and Materials, paragraph 3.4.1 states: "...unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water...for proper execution and completion of the work..." Eadie argues that it was not provided otherwise in the contract documents and as such the Contractor should be able to purchase materials and labor separately.

In summary, Eadie argues that DeLonge, by quoting labor only, did not provide Eadie with a bid outside of his license limitations.

RESPONDENT'S POSITION

PRT maintains that Eadie listed a subcontractor legally unable to perform the electrical work of the Project, and therefore Eadie's bid is non-responsive.

CPOC FINDINGS

The law concerning subcontractor listing is clear. Section 11-35-3020(2)(b) of the Code states in part:

"(i) The using agency... shall identify by specialty in the invitation for bids all subcontractors, as defined by applicable documents of the American Institute of Architects, who are expected to perform work to the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid."

In this case the Agency issued a Bid Form requiring the listing of an electrical subcontractor, among other specialties.

The law concerning the bidder's obligations to complete the Bid Form is equally clear. Section 11-35-3020(2)(b) continues as follows:

"(i)...Any bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractor(s) that will perform the work as identified in the invitation for bids..."

(ii) Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive."

In *Brantley*¹ the SC Procurement Review Panel (Panel) gave a clear and unambiguous reading to §11-35-3020(2)(b)(ii) when it stated that completion of the subcontractor listing in a Bid Form renders a bidder responsive “...on the face of the bid.”

Eadie listed DeLonge as its electrical subcontractor. Consistent with the Panel’s finding in *Brantley*, the CPOC finds that Eadie’s bid was responsive on its face.

However, in order to receive an award, an apparent low bidder must be found to be both responsive and responsible. Responsibility is determined at the time of award in accordance with the State’s standards as set forth in Regulation 19-445.2125(A), including:

“(1) ...[the] capability to meet all contractual requirements; [and]...

(4) qualified legally to contract with the State...”

Bidders who lack the capability to meet all contractual requirements with their own forces typically seek to augment their capabilities with those of subcontractors. Therefore a determination of responsibility must an assessment of both the general contractor and its listed subcontractors. Each listed subcontractor must be found responsible with respect to its designated portion of the total work. The failure of any listed subcontractor to meet any of the standards of responsibility renders the bid non-responsible.

In this case, Eadie proposed, in the Bid Form, for DeLonge to perform all of the electrical work. In order to do so, DeLonge must be licensed in accordance with §40-11-30 of the SC Code of Laws, as amended, (SC Code) as follows:

“No entity or individual may practice as a contractor by...offering to perform contracting work for which the total cost of construction is...greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.”

¹ See *In re: Protest of Brantley Construction Co., Inc., Appeal of Brantley Construction Co., Inc.*, Case 1999-3 before the SC Procurement Review Panel. See page 3.

Title 11, Chapter 40, Section 260 of the SC Code establishes levels of licenses based on the “total cost of construction” which a licensee is legally entitled to perform. In this case, DeLonge possesses a Group One Mechanical Contractors license which limits DeLonge to work costing no more than \$17,500. Title 11, Chapter 40, Section 20 of the SC Code defines the “total cost of construction” as:

“...the actual cost incurred...for labor, material, equipment, profit and incidental expenses for the entire project.”

The Executive Director of the Contractors Licensing Board confirmed to the CPOC that in the case of specialty subcontractors, the term “total cost of construction” applies to the value of the work regulated by that specialty. The Director further stated that the subcontractor must include all of the elements listed above, regardless of who buys or pays for the materials. In this case, DeLonge provided a quotation to another bidder for what the CPOC believes reasonably represents “the total cost of construction” for the electrical portion of the Project, specifically \$40,520. Eadie states in its defense to the issue of DeLonge being limited to electrical work costing \$17,500 or less, that Eadie intended to purchase the material for the electrical work and DeLonge would provide the labor. Whether or not this was Eadie’s intent is irrelevant for the purposes of licensure. Section 40-11-300 of the SC Code states in part:

“(A) It is unlawful for...a contractor to divide work into portions so as to avoid the...requirements of this chapter as it relates to...license groups...The total cost of construction must be used to determine the appropriate license group for a project.”

Therefore, for purposes of determining whether DeLonge has the required license, both the labor and materials for the electrical portion of the work must be considered.

The CPOC finds that Eadie listed DeLonge as its electrical subcontractor. This is specialty subcontractor work whose value is some \$40,000. This amount of electrical work clearly falls beyond the limits of DeLonge’s electrical contractor’s license. Accordingly, DeLonge cannot legally perform the electrical portion of the Project. Likewise, Eadie cannot legally satisfy its contractual obligations. Accordingly, the CPOC finds that Eadie must be determined non-responsible. The CPOC finds that Eadie failed to submit a responsible bid, and PRT’s declaration that it could not accept Eadie’s bid, while founded on the wrong grounds, is upheld.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the bid of Eadie's Construction Company, Inc. is non-responsible and cannot be considered for award. The Department of Parks, Recreation and Tourism is hereby authorized to proceed with the award of the Project to the lowest responsive and responsible bidder, consistent with its programmatic needs.

A handwritten signature in black ink that reads "Michael M. Thomas". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Michael M. Thomas
Chief Procurement Officer
for Construction

November 2, 2000
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.